Boston College Law Review

Volume 4 | Issue 3 Article 21

4-1-1963

Communications—FCC—Unfair Competition by Community Antenna Service.— Cable Vision, Inc. v. KUTV, Inc.

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alternative would be to rule that the surety can elect to stand on his rights of subrogation; or to file a financing statement, thereby waiving his rights of subrogation, as held in the *Hartford Acc. & Indem. Co.* case, and electing to stand on his legal rights under the Code. A third alternative, and one with much to commend it, is for the court to hold that there is no need to look beyond the statute to determine the surety's right. The Code has provided an adequate legal remedy by which sureties, by following proper procedures, can establish legal security interests having absolute priority over the trustee in bankruptcy and almost certain priority over all other creditors of the defaulting contractor. It would seem that the "equitable subrogation" doctrine, designed to provide the surety with a remedy where none was previously provided by common law or statute, is superfluous.[34]

The *Pearlman* case provides an uncertain basis for granting the surety "equitable subrogation" in retained percentages which the United States holds as a stakeholder in jurisdictions in which the Uniform Commercial Code is not in effect. In Code jurisdictions, no reason is apparent why the "equitable subrogation" doctrine should not be abandoned.

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Communications—FCC—Unfair Competition by Community Antenna Service.—***Cable Vision, Inc. v. KUTV, Inc.***[1]—In an action commenced on antitrust grounds by a community antenna operator, the defendant, a local television station, filed a compulsory counter-claim and applied for a preliminary injunction against plaintiffs. The defendant station alleged that it had exclusive contract rights to the "first run" of major network programs in the Twin Falls, Idaho area. It further alleged that the activities of the plaintiff community antenna operator, in picking up and distributing these programs to its subscribers at the same time they were broadcast by the station, constituted tortious interference with these contract rights and was a means of unfair competition. HELD: The contractual arrangements made by the local station with the television networks which granted the limited right of first call exclusively upon the programs of the latter is a valuable property right, protectable by injunction from the tortious interference and unfair compe-

Stat. 1029 (1940), as amended, 31 U.S.C. § 203 (1958), which authorizes the assignment of the contractor's contract claims against the Government to a bank or other financial institution as security for the extension of the financing necessary to enable small contractors to undertake government contracts. Such assignments were previously null and void as against the United States. Financing institutions would be increasingly reluctant to extend such credit if the major source of security in the event of default and bankruptcy of the contractor, i.e., the retained percentages, is held to belong to the surety regardless of whether it has taken the steps necessary to perfect its interest, which would have served to put the bank on notice of that interest.

[34] A similar policy is found in the analogous provisions dealing with "preferred creditors" in Bankruptcy Act, § 60a(6), 30 Stat. 562 (1898), as amended, 11 U.S.C. § 96a(6) (1958), which provides: "The recognition of equitable liens where available means of perfecting legal liens have not been employed is declared to be contrary to the policy of this section."

[1] 211 F. Supp. 47 (D. Idaho 1962).

tition of the community antenna operator. The court further held that its determination of this controversy was not pre-empted by the Federal Communications Act. In a supplementary opinion this right was held to extend not merely to programs which the local station broadcasted simultaneously with the network affiliates but also to "delayed" broadcasts, and syndicated and feature films.

The community antenna service companies, (CATV), originated in communities where for the most part either because of their distance from stations or particular geographic location, satisfactory television reception was unavailable.[2] When this situation exists there is no conflict because CATV provides a larger audience than would otherwise be available. It is able to provide such service to its subscribers by means of a master antenna located at some advantageous location and through microwave facilities. After receiving the signal from a distant station, CATV brings the program to its subscribers by means of a cable connected to the subscribers' home viewing sets. CATV is not a "broadcaster" within the meaning of the Federal Communications Act[3] and is therefore not subject to the act's provisions regulating broadcasters. To the extent that CATV utilizes the microwave facilities of a common carrier it is indirectly subject to the FCC licensing of these carriers.[4]

Since the defendant is the sole television station in the community, there can be but one program broadcast at a time from Twin Falls, whereas the choice of three additional programs from the Salt Lake City network affiliate stations is available to CATV subscribers. Because the local station's program is identical with that of one of the Salt Lake City stations, some of the Twin Falls viewers are not reached by the local station's commercials. A second instance where the local station objects to the activities of CATV occurs when "delayed" broadcasts or syndicated and feature films are picked up by CATV in advance of the date of the scheduled local broadcast. Here too, the commercials upon which the local station depends for revenue might not reach the subscribers.

The history of the present litigation began in a suit in federal court against the present plaintiffs, Cable Vision, Inc. and Idaho Microwave, Inc.[5] The former is the CATV operator while the latter is a microwave company, a common carrier, whose facilities are used by the CATV operator, both under common control. This first action was brought by the three network affiliated stations for declaratory and injunctive relief from alleged unfair competition and unjust enrichment. The theory of recovery advanced by the stations was within the doctrine of *International News Serv. v. Associated Press*.[6] The

[2] In 1959 it was estimated that there were some 700 CATV serving about two million persons. FCC 25th Ann. Rep. 62 (1959).

[3] Section 3, 48 Stat. 1065 (1934), 47 U.S.C. § 153(a) (1958).

[4] The Commission denied the application by a microwave company to install a relay to convey television signals for a CATV operator in Carter Mountain Transmission Corp., No. 12931, FCC, Feb. 16, 1962.

This case is pending on appeal, Carter Mountain Transmission Corp. v. FCC, No. 17089 (D.C. Cir. 1962).

[5] International Broadcasting & Television Corp. v. Idaho Microwave, 196 F. Supp. 315 (D. Idaho 1961), noted, 61 Colum. L. Rev. 1523 (1961) and 50 Geo. L.J. 171 (1961).

[6] 248 U.S. 215 (1918). For a comment dealing with this aspect of the present case see 65 W. Va. L. Rev. 69 (1962).

court denied relief because no exclusive license arrangement which would grant a property right to the stations was sufficiently documented and "the relationship between the public, defendant's microwave relay and plaintiff's broadcasts are not similar to or fairly comparable with the relationships in the *International News* case."[7] The court did not deny that CATV "had reaped where it had not sown," within the meaning of *International News*, but it refused to grant relief chiefly because the network affiliates and CATV were not competitors. In the present case there is little doubt that CATV and the local station are vying for the same audience.

The contract upon which the local station relied is one common to the industry and permitted by the FCC regulations.[8] Briefly, it provides the local contracting station with a limited right of first refusal to network programs as against the other stations in the community. In regard to this contract the court stated: "Certainly, KLIX [the local station] should not be permitted to assert any right of exclusivity against a community antenna more broadly than it could be asserted against the network organization or another station."[9]

However, the court found that the arrangement created a property right in the local station to the extent that this option provision was exercised. The activities of CATV were found to lessen the value of this "exclusive" right. It did concede that Congress could have, had it chosen, expressly "occupied the field" and inaction on its part should not necessarily be deemed to amount to license on the part of the states.[10] However, it was determined that Congress had not occupied the field.

The court in recognizing the pre-emption problem declared:

> In cases of obvious conflict with the Federal Communications Act and federal policy stemming from it . . . state law, common law or statute, is abrogated to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress.[11]

The court was convinced that there was no "obvious conflict" but found it necessary, because it was applying Idaho law, to ascertain whether in fact any conflict existed which would oust it of jurisdiction.

In examining the scope and operation of the Communications Act the court acknowledged that in at least one case a court had stated that the act constituted a plenary exercise of the power of the national government to occupy "fully the field of television regulation."[12] The court, finding no conflict, refused to accept these broad assertions without qualification, pointing to several instances where a station licensed by the FCC was held to be a proper party in litigation before state and federal courts.[13] It must be

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[7] Supra note 5, at 328.

[8] FCC Regulations § 3.658(b), 47 C.F.R. § 3.658(b).

[9] 211 F. Supp. at 53.

[10] Id. at 56.

[11] Ibid.

[12] Dumont Labs. v. Carrol, 184 F.2d 153, 156 (3d Cir. 1950).

[13] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). The court in the instant case noted that the Supreme Court in United States v. Radio Corp. of America,

remembered that the alternative open to the court, had it decided the pre-emption doctrine precluded it from deciding the case, would have been the recognition of a jurisdictional "no man's land" in which no court or agency could act.[14]

The court, since it ultimately relied on the *International News* doctrine,[15] may be assumed to have been aware of the cautions expressed by Mr. Justice Brandeis in his dissent.[16] There, Mr. Justice Brandeis, although recognizing the capacity of the common law for growth and sympathizing with the plight of the plaintiff whose news releases had been used by the defendant without authority, advised that the creation or recognition by courts of new private rights may work serious injury to the general public unless the boundaries of these rights are clearly defined and cautiously guarded. This, he said, was a job for the legislature and the administrative agencies for "Courts are ill-equipped to make investigations . . ."[17] where these new rights are involved. In *International News* the Court was not faced with the additional pre-emption[18] problem faced here, but the cautions expressed by Mr. Justice Brandeis should have indicated to this court what was to be expected when dealing with this very sensitive area.

The contract, which the court decided in this case created the local station's private rights, was, as indicated,[19] one common to the industry. Since there is but one station in the community involved in the present case the contract may be regarded as having extremely *dubious value*.[20]

The expressed objectives of the Communications Act include the making "available . . . to all the people of the United States a rapid, efficient, Nation-wide, . . . communication service . . . ."[21] The decision here, furthers this objective with regard to television stations. With respect to the CATV service companies the opposite is true. This would seem to frustrate a main purpose of the policy of the act for CATV, while not subject to the act, does aid in providing the desired coverage.[22] It would seem that the propagation of television programs should not depend on the adoption or non-adoption of the *International News* doctrine state by state. The instant court admitted that the doctrine has not received universal acceptance.[23]

358 U.S. 334, 350 (1958), had stated that the Federal Communications Act was not a "pervasive regulatory scheme" and that the *primary jurisdiction* doctrine did not preclude an antitrust action against an FCC licensed broadcaster. In the present case the primary jurisdiction doctrine had no application.

[14] As an example of the "no man's land" problem, see San Diego Bldg. Trades Council v. Garmon, 359 U. S. 236 (1959).

[15] Supra note 6.

[16] This was reflected in this court's prior opinion supra note 5, at 322.

[17] Supra note 6, at 267.

[18] Supra note 14.

[19] Supra note 8.

[20] This was further demonstrated when the present court noted: "[T]he present national policy clearly contemplates that there will be broadcast stations licensed by the network organizations in different communities but within the same general service area whose simultaneous broadcasts of network programs may overlap both communities without violation of any valid network station exclusivity arrangement." 211 F. Supp. at 53.

[21] Communications Act § 1, 48 Stat. 1069 (1934), 47 U.S.C. § 151 (1958).

[22] Ibid.

[23] Supra note 5, at 322, 323.

That portion of the injunction relating to delayed broadcasts, and syndicated and feature films, may work a serious hardship to CATV because, as the court indicated, the rights of local stations in these programs extends for a period of twenty-one days after the network broadcast.[24] Thus the local station may assert its right of first-call anytime within this twenty-one day period; and, until this right is exercised and the choice made known, CATV may not safely pick up any of these broadcasts. This problem may not prove as serious a hardship as anticipated if, as is the custom, the local station makes known in advance the schedule of its anticipated broadcasts. This is not to minimize, however, the undoubted impact of this sweeping injunction on CATV.

The court did refer to the views expressed by the FCC,[25] which indicated a desire to subject CATV to its rules. These rules require the consent of the originating station before a program may be reproduced by another broadcaster.[26] Congress has consistently refused to extend control over CATV to the FCC.[27]

It is submitted that the result of the decision in the present case subjects CATV to a more stringent requirement than even the FCC advocates, for now CATV is prohibited from picking up these programs even if it has obtained the permission of the broadcaster. This demonstrates what prompted Mr. Justice Brandeis' admonition of caution on the part of courts when dealing with this sensitive problem. The decree effectively limits the available selection of television programs to the people of Twin Falls and prefers an artificial property right to the interest of the general public. It remains to be seen whether Congress anticipated this reaction to its refusal to extend the authority of the FCC.

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Constitutional Law—Due Process—Blacklisting—Agency Action without a Hearing.—*Kukatush Mining Corp. v. SEC.*[1]—A nonresident alien corporation having no assets and doing no business in the United States sought a preliminary injunction against the Securities and Exchange Commission to have its name removed from the "Canadian Restricted List."[2] The corporation alleged that (1) its name was placed on the list without any no-

[24] 211 F. Supp. at 54.

[25] Id. at 55. See also FCC 28th Ann. Rep. 65, 66 (1962).

[26] Ibid.

[27] 211 F. Supp. at 55. Two recent bills were H.R. Rep. No. 6840, 87th Cong., 1st Sess. (1961), S. Rep. No. 1044, 87th Cong., 1st Sess. (1961). See also, Inquiry into the Impact of CATV, T.V. Translators, T.V. "Satellite" Stations and T.V. "Repeaters" on the Orderly Development of T.V. Broadcasting, 26 F.C.C. 403 (1959).

[1] 309 F.2d 647 (D.C. Cir. 1962).

[2] The Canadian Restricted List is a list of Canadian companies whose securities the Commission has reason to believe have been or are being distributed in the United States in violation of the registration requirements of the Securities Act of 1933. See SEC Securities Act Release No. 3632 (1956). For SEC policy on deletions, see Release No. 4240 (1960).